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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 300.

THE CENTRAL RAILROAD AND BANKING COMPANY
OF GEORGIA, PLAINTIFF IN ERROR,

vs.

JAMES C. McKENZIE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE MIDDLE DISTRICT OF ALABAMA.

FILED SEPTEMBER 15, 1884.

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1 November Term, 1883.

At a circuit court of the United States for the middle district of Alabama, in the fifth judicial circuit, begun and holden at Montgomery, Alabama, on the first Monday in November, it being the fifth day of said month, in the year of our Lord one thousand eight hundred and eighty-three—present and presiding, the Honorable John Bruce, judge of the district courts of the United States for the State of Alabama, sitting as circuit judge—the following proceedings were had:

* * * * * * *

Transcript of Record & Proceedings in Circuit Court of Barbour County, Ala.

THE STATE OF ALABAMA, *Barbour County:*

Circuit Court.

To any sheriff of the State of Alabama, Greeting:

You are hereby commanded to summon The Central Railroad and Banking Company of Georgia, a corporation, to appear at the next term of the circuit court to be held for said county at the place of holding the same, at Eufaula, then and there to answer the complaint of James C. McKenzie.

Witness, this 24th day of March, 1883—

HENRY BRADLEY, *Clerk.*

2 *Complaint.*

JAMES C. MCKENZIE, Plaintiff,

vs.

THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA, Defendant.

The plaintiff claims of the defendant fifty thousand dollars as damages in this, that heretofore, to wit, during the year 1882, the said defendant was engaged in and carrying on the business of a common carrier, and as such common carrier controlled and operated a railroad for the carriage of freight and passengers for hire between the city of Macon, in the State of Georgia, and the city of Eufaula, in the State of Alabama, and as such common carrier it became and was its duty to keep its road-bed and superstructure, and its cars, engines, and other machinery and appliances necessary to run and operate said railroad, in good and sufficient repair, and to have its cars run with due care, and to provide careful, discreet, competent, and skillful employees in and about the conducting of its said business and running its trains for the safe carriage of all persons who might travel on or along [said] railroad as passengers thereon.

3 And the said plaintiff became and was a passenger upon the regular passenger train of the defendant on the 8th day of December, 1882, at Cuthbert, in the State of Georgia, proposing

to travel thence on said train to the city of Eufaula, in the said State of Alabama, for a certain fare or passage money exacted by said defendant and paid by plaintiff; and thereupon it then and there became and was the duty of the said defendant to safely carry and transport said plaintiff from Cuthbert, in said State of Georgia, to Eufaula, in said State of Alabama; yet the said defendant, not regarding its duty in that behalf, permitted its road-bed and its railroad track and superstructure thereon to become in such bad condition and out of proper repair, and it permitted its said train of cars to be managed, controlled, and run by such careless and indiscreet, incompetent, and unskilled employés and in such a careless and negligent manner, that by reason thereof on said 8th day of December, 1882, and whilst the said train of cars was running with the said plaintiff thereon in and along said railroad track between said Cuthbert, in the State of Georgia, and said Eufaula, in the State
of Alabama, and before its arrival in Eufaula, in the State of
4 Alabama, and near Georgetown, in the State of Georgia, the
said train of cars ran off of said railroad bed and off of said railroad track and was overturned and thrown down an embankment, and by means whereof the said plaintiff was greatly bruised, wounded, and injured; and also by means of the premises the said plaintiff became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, more than three months, during all of which said time the said plaintiff suffered and underwent very great mental and bodily pain and was hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of divers great gains, profits, and advantages which he might and otherwise would have derived and acquired; and his services in said business, to wit, the business of grocery merchant, were of great value, to wit, of the value of five thousand dollars per annum, which said services were lost to the plaintiff by reason of said injuries, and that during the time aforesaid he became largely indebted to Dr. P. D. L. Baker and to other physi-
cians and persons for medical care and attention and for
5 medicine and nursing, to wit, in the sum of five thousand
dollars, and in the future for a long period, to wit, the balance of his natural life, will be compelled to incur by reason of his said injuries a large and constant expense for medical services, medicines, and nursing, to wit, the sum of ten thousand dollars, for care and medical attendance, and that by reason of said injuries so received as aforesaid the said plaintiff will in the future, and perhaps for life, continue to suffer great mental and bodily pain, and be sick, sore, lame, and disordered and unable to transact and carry on his necessary and lawful affairs; therefore plaintiff is damaged fifty thousand dollars as aforesaid, and brings this suit to recover the same.

McKLEROY AND COMER,
Attorneys for Plaintiff.

THE STATE OF ALABAMA, *Barbour County:*

Before me, G. L. Comer, notary public in and for said county, personally comes J. M. McKleroy, one of the attorneys for the plaintiff in the within-stated case, who, being duly sworn, says that 6 the president or other head of the defendant corporation and the secretary, cashier, or managing agent thereof reside out of the State of Alabama.

JNO M. McKLEROY.

Sworn to and signed before me Mar. 21, 1883.

G. L. COMER,
Notary Public.

Upon the above summons and complaint appears the following endorsement: "Filed this 24th day of March, 1883. Henry Bradley, clerk."

Received in office this 24th day of March, 1883.

SANDIE MARTIN, *Sheriff.*

Executed this 26th day of March, 1883, by leaving a copy of the within summons & complaint with Charles J. McLauglin, a white person in the employ of the Central Railroad and Banking Company of Georgia.

SANDIE MARTIN, *Sheriff.*
B. JAMES, *Deputy.*

Petition for Removal.

THE STATE OF ALABAMA, *Barbour County:*

In the Circuit Court of Barbour County, Alabama. June Term, 1883.

JAMES C. MCKENZIE

vs.

THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA, a Corporation.

Action for damages for personal injuries.

7 To the Honorable Henry D. Clayton, judge, presiding:

Your petitioner, The Central Railroad and Banking Company of Georgia, respectfully shows that it is the defendant in the above-entitled cause pending in said court, and that said suit was brought on the 24th day of March, 1883, by the plaintiff in said court; that your petitioner is a corporation chartered by the laws of Georgia, and is and was a citizen of said State of Georgia, and that said plaintiff is and was a citizen of the State of Alabama.

Your petitioner further shows that there is, and was at the time said suit was brought, a controversy between said plaintiff and your petitioner; that said suit was brought by said plaintiff for the purpose of recovering damages for alleged personal injuries occurring to him, as passenger on petitioner's railroad train, by reason of a failure of duty by your petitioner as a public carrier of passengers, and that the damages laid in the complaint filed in said cause exceeds the sum or value of $500; that, therefore, the amount in dispute, exclusive of costs, exceeds the sum or value of $500; that this, the present, term of court is the first term held after the suit was brought; that said suit has not been tried, and that your 8 petitioner files this petition at the time of entering an appearance in this court, and your petitioner desires to remove this cause into the next circuit court of the United States for the middle district of Alabama, in pursuance of the provisions of section 639 of the Revised Statutes of the United States.

Your petitioner further says that he has filed the necessary affidavit, hereto attached, and offers herewith its bond, and prays that the same may be accepted, and that the said suit may be removed as aforesaid, and that no further proceedings be had in this State court.

ROQUEMORE AND SHORTER,
Attorneys for Petition-.

THE STATE OF GEORGIA, *Chatham County:*

Before me, Marion Erwin, deputy clerk of U. S. circuit court for the southern district of Georgia, personally came W. G. Raoul, who, being sworn, says that he is the president of the Central Railroad and Banking Company of Georgia, corporation; that he has read the foregoing petition and knows the contents thereof, and that the statements and allegations therein contained are true, to the best of his belief.

W. G. RAOUL.

Sworn to and signed before me this the 22d day of May, 1883.

MARION ERWIN,
Deputy Clerk C. C. for the Southern Dist. of Ga.

9 STATE OF ALABAMA, *Barbour County:*

Know all men by these presents that we, The Central Railroad and Banking Company of Georgia, a corporation, as principal, and S. H. Dent and John D. Roquemore, sureties, are held and firmly bound unto J. C. McKenzie in the penal sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and adminstrators and successors.

Sealed with our seals and dated the 22d day of May, 1883.

The condition of the above obligation is such that whereas a suit was brought on or about the 24th day of March, 1883, by James C. McKenzie against the defendant, The Central Railroad and Banking Company of Georgia, in the circuit court of Barbour county, at Eufaula, and the same is now pending for trial in said court, and is removable into the circuit court of the United States for the middle dis-

trict of Alabama under subdivision one, section 639, of the Revised
Statutes of the United States: Now, if The Central Railroad and
Banking Company of Georgia shall enter and file, or cause to be
entered and filed, in the next circuit court of the United States as
aforesaid, on the first day of its session, copies of all process,
10 pleadings, depositions, testimony, and other proceedings in
said suit, and shall do such other appropriate acts as by the act
of Congress in that behalf are required to be done upon the removal
of such suit from said State court into the said court of the United
States, then this obligation is to be void, otherwise to remain in full
force and effect.

THE CENTRAL R. R. & B'K'G. COMPANY
OF GEORGIA,
By W. G. RAOUL, *Pres'd't.* [SEAL.]
S. H. DENT. [SEAL.]
JOHN D. ROQUEMORE. [SEAL.]

STATE OF ALABAMA, *Barbour County:*

We, S. H. Dent and John D. Roquemore, both of said county, the sureties named in the foregoing bond, being duly sworn, do depose and say that we are residents of the State of Alabama and property holders therein; that we are worth the sum of five hundred dollars over and above our exemptions, debts, and liabilities; that we have property in the State of Alabama liable to execution of the value of more than five hundred dollars.

S. H. DENT.
JOHN D. ROQUEMORE.

Sworn to and subscribed before me this the 6th day of June, 1883.
HENRY BRADLEY, *Clerk.*

11 Upon the above petition appears the following endorsement: "Filed in office June 6th, 1883. Henry Bradley, clerk."

Order of Court.

THE STATE OF ALABAMA, *Barbour County:*

In the Circuit Court of said County, at Eufaula.

Be it remembered that at the June term, 1883, of said court, upon a petition filed by the defendant in a cause therein pending, entitled as follows, James C. McKenzie *versus* The Central Railroad and Banking Company of Georgia, for the removal of said cause to the circuit court of the United States for the middle district of Alabama, an order was made and entered by said circuit court of Barbour county in words and figures as follows, to wit:

JAMES C. MCKENZIE *vs.* C. R. R. & B'K'G CO. OF GA.

JUNE 14, 1883.

Came the defendant, by *their* attorneys, Roquemore and Shorter, and files in this court a petition for the removal of this cause into

the circuit court of the United States for the middle district of Alabama, and, it appearing to the court from said petition that the controversy in said suit is wholly between a citizen of Alabama
12 and a citizen of Georgia; that the amount in controversy, exclusive of costs, is more than $500, and that said defendant has entered into bond as required by law, it is therefore considered, ordered, and adjudged by the court that the prayer of said petition be granted and the said cause removed to said circuit court of the United States for said district; and the clerk of this court is ordered to send all of the original papers in this cause, under seal, to the clerk of said circuit court of the United States for the middle district of Alabama thirty days before the sitting of said court at the next term thereof, with a certified copy of this order and a certificate showing the papers sent and an identification of the same.

THE STATE OF ALABAMA, *Barbour County:*

I, Henry Bradley, clerk of the circuit court in and for the said county of Barbour and State of Alabama, do hereby certify that the foregoing pages, numbered from one to thirteen, inclusive, contain a full, true, correct, and complete transcript of all the papers, documents, and proceedings had in the case of James C. McKenzie *vs.* The Central Railroad and Banking Company of Georgia
13 as the same appear on file and of record in the clerk's office in said State circuit court.

[SEAL.] HENRY BRADLEY,
Clerk of said Circuit Court.

Received and filed this 3d day of Nov., A. D. 1883.
J. W. DIMMICK, *Clerk.*

Order Granting Leave to File Transcript.

JAMES C. MCKENZIE
vs.
THE CENTRAL R. R. AND BANKING CO. OF GA.

MONDAY, *November* 5, 1883.

Comes the defendant, by attorney, and by leave of the court first had and obtained, files a transcript of the record and proceedings in this cause from the circuit court of Barbour county, which is done in open court.

14 *Admission of Defendant.*

In the Circuit Court of the United States at Montgomery, Alabama.

JAMES C. MCKENZIE
vs.
CENTRAL RAILROAD & BANKING CO. OF GEORGIA.

THOMAS M. LOWERY
vs.
CENTRAL RAILROAD & BANKING COMPANY OF GA.

It is admitted by the defendant in the two cases above stated that it is a foreign corporation, chartered and doing business under the laws of the State of Georgia, and that under its act of incorporation it is a common carrier; that prior to December 8th, 1882, it has leased the Southwestern railroad, running from Macon, in the State of Georgia, to Eufaula, in the State of Alabama; and that prior to December the 8th, 1882, and on said December the 8th, 1882, and since that time, it had charge of said Southwestern railroad and had exclusive control of it, and was running its, defendant's, cars over said road as said lessee, as above stated; and this admission is to be used by the plaintiffs in the above-stated causes on the trial of said causes at the present term of the court.

Dated December 16, 1883.

ROQUEMORE AND SHORTER,
ARRINGTON AND GRAHAM,
Att'ys for Def't.

15 *Plea in Abatement.*

In the Circuit Court of the United States for the Middle District of Alabama. November Term, 1883.

JAMES C. MCKENZIE
vs.
THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA.

Now comes the said defendant, by its attorney, J. N. Arrington, and says the said plaintiff ought not further to sustain this suit, because it says that at the time the summons and complaint in this cause were issued this defendant was a corporation chartered, incorporated, and organized under and by virtue of authority granted by the State of Georgia, and that it was, at the time said summons and complaint were issued, doing business under said charter, and it was not, at the time the said summons and complaint were issued, chartered, incorporated, or organized under authority of the State of Alabama or the laws thereof.

And this the defendant, by its said attorney, is ready to verify; wherefore it prays judgment of the said summons and complaint, and that the same may be quashed, etc.

J. N. ARRINGTON,
Attorney for Defendant.

16 Before me, B. P. Seals, deputy clerk of the circuit court of the United States for the middle district of Alabama, personally appeared J. N. Arrington, attorney for the defendant in the above-stated case, who, first being duly sworn, says on oath that the statements made in the foregoing plea are true and correct.

J. N. ARRINGTON.

Sworn to and subscribed before me this the 16th day of November, 1883.

B. P. SEALS,
Dep. Clerk U. S. Cir. Court, Mid. Dist. Ala.

Filed Nov. 16th, 1883.

J. W. DIMMICK, *Clerk.*

17 *Motion to Quash Service.*

U. S. Circuit Court for the Middle District of Alabama. December Term, 1883.

JAMES C. MCKENZIE *vs.* C. R. R. & B. Co.

The defendant, by its attorneys, moves the court to set aside the service of the summons upon it in this cause, because the contract set forth in the complaint was made in the State of Georgia, and the defendant at the time the summons in this case was issued, and at the time the contract set forth in the complaint was made, was a foreign corporation, incorporated only under the laws of the State
18 of Georgia, and the return of the sheriff shows that service of the summons was made upon Charles J. McLaughlin, a white person in the employment of the defendant, who was not the president, vice-president, secretary, treasurer, or managing agent of the defendant corporation.

ROQUEMORE AND SHORTER,
ARRINGTON & GRAHAM,
Att'ys for Motion.

Filed this 17th day of Dec., 1883.

J. W. DIMMICK, *Clerk.*

Demurrer.

JAMES C. MCKENZIE *vs.* CENTRAL R. R. AND B. CO. OF GEORGIA.

The defendant demurs to so much of the complaint as in the following words, to wit, "and to other physicians and persons for medical care and attention and for medicine and nursing," on the following grounds, to wit, because the complaint does not show that the plaintiff had paid such other physicians and persons for such medical care and attention.

We agree that the within is correct.

ARRINGTON AND GRAHAM.
TROY AND TOMPKINS.

Filed Dec. 21st, 1883.

J. W. DIMMICK, *Clerk.*

19 *Judgment.*

James C. McKenzie
vs.
The Central Railroad and Banking Company of Georgia.

Friday, *December* 21, 1883.

This cause came on to be heard at this term, and the defendant, by its attorney, in writing, moves the court to set aside the service of the summons upon it in this cause, because the contract set forth in the complaint was made in the State of Georgia, and because at the time said contract was made and at the time the summons in this cause was issued the defendant was a corporation incorporated only under the laws of the State of Georgia, and the return of the sheriff shows that service of the summons was made upon Charles J. McLaughlin, a white person in the employment of the defendant, who was not the president, vice-president, secretary, treasurer, or managing agent of the defendant corporation; To which motion the plaintiff demurs on the ground that the same is insufficient in law; and the court sustains the demurrer and overrules the motion. And the defendant, by consent in writing of the plaintiff, files its plea in abatement in writing; to which the plaintiff demurs upon the ground that the said plea in abatement is insufficient in
20 law; which said demurrer, being fully argued by counsel and considered by the court, is sustained. The defendant demurs to so much of the complaint as is in the following words, to wit, "and to other physicians and persons for medical care and attention and for medicine and nursing," on the following ground, to wit, because the complaint does not show that the plaintiff had paid such other physicians and persons for such medical care and attention; and the said demurrer is overruled by the court. Thereupon came a jury of twelve good and lawful men, to wit, W. T. Lary and eleven others, who, being duly elected, tried, and sworn well and truly to try the issue joined between the parties, upon their oaths do say: "We, the jury, find for the plaintiff and assess the damages at sixteen thousand eight hundred dollars" ($16,800). It is therefore considered by the court that the said plaintiff recover of the said defendant the said sum of sixteen thousand eight hundred dollars ($16,800), and also the costs in this behalf expended, for which let execution issue.

21 *Bill of Exceptions.*

In the Circuit Court of the United States for the Middle District of Alabama, at the November Term, 1883.

James G. McKenzie
versus
The Central Railroad and Banking Company of Georgia.

Be it remembered that at the said November term, 1883, to wit, on the 17th day of January, 1884, the above-entitled cause was called for trial, and both parties having announced themselves ready for trial, it was proceeded with, wherein and whereon the following proceedings were had:

The plaintiff introduced as evidence in his behalf an agreement between the plaintiff and the defendant to the following effect, to wit: That the defendant before and at the time the plaintiff received the injury complained of in his complaint, and at the time the suit in this case was commenced, and it is now, a corporation incorporated, organized, and doing business under and by authority of the State of Georgia, and at the time the plaintiff received his said injury was operating the Southwestern railroad under a lease from the Southwestern Railroad Company.

J. C. McKenzie, the plaintiff, being then sworn in his own
22 behalf, testified as follows: I am the plaintiff in this case, and
reside in Eufaula; I am in the wholesale grocery and liquor business, and have been in that business fifteen years; I am thirty-six years old. I was a passenger on the Southwestern railroad on the eighth day of December, 1882, from Cuthbert, Ga., to Eufaula, Ala.; the cars got off the track that afternoon. I was in the smoking-car at the time—a regular place provided for passengers. When the cars ran off we were about two miles from Eufaula; I was damaged by that run off; we were running at a very rapid rate, so much so as to attract my attention; we were behind time, and that was the reason we were running so fast; we were running around the curve very rapidly, and where it ran off there is a very high embankment, and the cars all tumbled down the embankment; my car went out further than the others, or as far, and turned over I don't know how often, and I was dangling around in there, and when I fell I fell on my back and lay there; that injury has made me a cripple, and for several weeks I did not get out at all, and have not been able to attend to my business since, except to stay
around the office; I suffered the most intense pain; I was injured
23 in the back and hip. I have no use of myself at all with
my arms; I could not drive a horse; my back pains me all the time, more or less, and I am continually reminded of being a cripple; I have not slept hardly any in the last two weeks on account of the pain. My services in my business were worth five thousand dollars a year; my injuries required that I should be under the treatment of a doctor, and I employed Dr. Baker, who attended me until his death, and after his death I engaged Dr. Goodwin, and during his absence I have been under the treatment of Dr. Holt; I have been under treatment ever since I received the injury, and fear that I will continue to be so in the future. I paid Dr. Baker for his services something before his death, and paid Mrs. Baker two hundred dollars after his death. At first he came to see me two or three times a day, and after that two or three times a week; Dr. Goodwin sees me all the time; Dr. Holt has been to my room every night. I find that since the accident I do not recollect things as well as I used to. When I was sick I had a negro

boy to nurse me; he was worth thirty or forty dollars a
24 month; he was with me all the time. I have lost the use of
my right leg; my suffering at the time and since the accident has been all I could bear; I have no hopes physically.

On cross-examination the plaintiff testified as follows: I was born in 1847. The cars were running; thirty-five to forty miles an hour, though I had no means of measuring the speed, except by seeing things pass and the land running, I don't think the speed was any greater when they ran off than before; I was silent on account of the fast running; I heard a gentleman say at Cuthbert that the train was behind time.

Dr. ALBERT GOODWIN, being sworn for plaintiff, testified as follows: I am a physician and reside in Eufaula; have been practicing nearly eleven years. Since the time the plaintiff got up I have been with him every day, with the exception of five or six weeks, when I was absent from the city. When I was first called in I found him suffering from a hip bruised and contused from some violent injury, and a diseased spinal chord consequent upon the concussion. Such an accident as has been described would be likely to produce such a
result. I think his suffering has been very great. From my
25 knowledge of the injury, I should think he would suffer more
or less; he has occupied the same room with me in the last day or two, and his condition has not been so good as when I saw him two weeks ago; I think it extremely doubtful that he ever recovers; the probabilities of the injury continuing are very great. In such accidents if they don't recover in a short time the injury is likely to be permanent. He seems to be suffering either from inflammation or change in the structure of the spinal chord; there is some inflammation of the chords or membranes of the spine, which causes the suffering in his back. An inability to rotate the spine—one of those vertebræ that go to make up the spinal column; if properly rotating they can rotate on each other; he cannot turn his head without pain; the spine is one of the most vital parts of the anatomy of man, and an injury to it is calculated to break up the nervous system entirely; the spinal cord is a continuation of the brain, which would sometimes be affected by an injury there and sometimes would not, but where the entire mass is contused it is likely
that the brain would be involved in it. I think his brain has
26 been affected in the way of loss of memory; if he gets well
that will be removed too. I suppose a reasonable charge for my services would be $100. If he requires as much attention in the future as in the past the reasonable charge for the services of a physician would be about $300 a year. The probabilities are that he will require more or less attention in the future; he may get worse and require attention twice a day or only once a week. He complained of being restless last night and was in pain; that has been his condition more or less since I have been with him. In his present condition he can transact some business, but not the amount he did before. I have had every opportunity of observing him; his injury would have the effect to destroy his genital powers or diminish their

capacity. I think it has resulted in that way to some extent. His general health has greatly depreciated, and the right leg seems to [be] in a kind of paralytic state; not a decided paralysis, but a want of vitality; it is cold and the sense is obtuse. He has the symptoms of paralysis about the sphincter, an inability to hold his fœces at times, especially when his bowels are a little disposed to be loose,
and inability to control himself sufficiently long to get to the
27 water-closet. He had trouble in passing his urine. These
symptoms would be the natural results of an injury received as described.

(It was admitted that the plaintiff had made expression indicating pain.)

Redirect examination:

From my knowledge of Mr. McKenzie and his injury that collapse of the nerves is probably the result of the injury, and not from the use of narcotics. In taking morphine the system becomes used to the drug, and the quantity is increased to give the effect. The quarter of a grain I gave him had the effect of making him sleep and relieve the pain. It would not have relieved him if he had been in the habit of taking more than that at a dose, or if he had been accustomed to taking that for any length of time.

Dr. S. A. Holt, being sworn for the plaintiffs, testified as follows:

I live in Eufaula, and am a physician; have been practicing about twenty-five years. I have known the plaintiff over seven years. Prior to this accident he was an active, energetic, thorough-going
business man, apparently in perfect health. I was called in to
28 see him some fourteen or fifteen days ago on account of the
absence of Dr. Goodwin. I have continued my visits since. I found a good deal of tenderness a little above the middle dorsal vertebra, the third, fourth, or fifth. There was curvature of the spine, with a good deal of tenderness and intense pain extending down through the thigh and hip. He seemed to be very much prostrated by the accident. He seems to be a physical wreck compared to what he was formerly. This condition would be the result of spinal concussion. There is more or less paralysis of the right limb, and his toes are inclined to be drawn in. He straddles his legs a little in locomotion. There is six or eight degrees difference between the temperature of that limb and the other. It is partial paralysis. Judging from his present condition, it is likely to be permanently so. Unless the spinal irritation subsides his general physical condition is likely to remain as now. Patients are not likely to recover after the expiration of twelve months. If they do not recover in that time the recovery will not be complete. I think his condition is worse than a few months ago. The indications are that he will grow worse. For two or three days after I first saw him he had
great difficulty in urinating. He complained very much.
29 Paralysis of the sphincter and bladder are the natural results
of such an injury. There was a slight lateral curve of the

spinal column. The concussion of the spine would probably produce that. This injury might result in paraph-aga or hemaphlaga if it continues. Hemaphlaga is where the upper parts of the body are paralyzed; paraphlaga where the lower part is paralyzed. Such an injury does not necessarily affect the brain, but if there is a molecular change of the spinal *ch*ord, even the me*m*inges of the spinal *ch*ord, it may affect the brain, because the brain is a continuation of the spinal *ch*ord. Such injuries very frequently affect the genital organs. He seemed to be perfectly broken down with neuralgic pains, facial, in the lower limbs, and in his shoulders, so as to prevent his sleeping, and was nauseated. These would be the natural results occurring from an injury to the spine. I suppose twenty-five or thirty dollars would be a reasonable fee for my services. Judging from what I have seen, his probable medical expenses in the future, if necessary, would be four or five hundred dollars a year; maybe a thousand, if he required much attention. I
30 do not think he would [have] been quieted with one-third of
a grain if he had been in the habit of using morphine. The character of his sleep is very disturbed. I watched him several nights and he seemed to be dreaming and startled and cried out. The dreams and disturbed sleep were consequent upon the injuries he sustained.

The plaintiff then rested his case.

D. M. GUGEL, being sworn for the defendant, testified as follows:

I am master mechanic of the Central road in Macon, and look after the locomotive department. The engine that run off was in perfect order when it left that day. I have known the engineer as an engineer for ten years. He was very conversant with his work. I always looked upon him as being a good, careful engineer. He was running one of our best locomotives. It was the favorite with the men on the road. I have been in this department twenty-two years.

On cross-examination this witness testified:

The name of the engine was Forrest City. I saw the engine the day before. I did not examine it individually. When there
31 is anything wrong about an engine it is reported to the engi-
neer. I did not examine the engine personally.

Redirect examination:

I had a man to do that business; it is the engineer's duty to report anything that is wrong with the engine.

S. J. KENT, being sworn in behalf of the defendant, testified as follows:

I have been locomotive engineer for ten or twelve years; am an employé of the Central railroad; the engine that ran off was in good condition; I was the engineer; it was in perfect order when I left

Macon; I examined it before I came out; the front truck and tender was broken after the run-off; the engine did not run off the embankment; I was running twenty-five or thirty miles an hour; I cannot tell the rate of speed only by my judgment and experience and by looking at the mile-posts; I was a little behind time; our running speed was twenty-five miles an hour, as well as I can recollect; we ran off on a curve; the engine was the last thing that got off; the cars dragged the engine off; I don't know what car
32 went off first; I assisted in getting the passengers out of the cars, and went up on the embankment afterwards; I could not see the road-bed enough to tell what caused the accident; the track was torn up, I suppose, for one hundred yards; some of the heads of the ties were broken off; the stringers and cross-ties were all fastened together; I can't tell exactly the speed of the train; I was not looking at the mile-posts that evening; I was running at the regular schedule; I was increasing the speed a little; there was a down grade a good way; I blew the signal to put on the brakes for crossing, and it was that quick that the thing happened.

Cross-examination of S. J. Kent:

I had nothing to attract my attention to the mile-posts that evening; I was about eight minutes behind time the last time I looked at my watch; I was fifteen minutes behind at Brown's station; I looked at my watch after I left Hatcher's, and I was endeavoring to make up for lost time between there and Eufaula; of course, we make up for lost time as quick as we can, not to run reckless; the speed decreased when I put on the brakes; from Hatcher's station I was trying to increase the speed to what I was allowed, and
33 it continued to increase until I applied the brakes.

W. F. Shellman, being sworn in behalf of the defendant, testified as follows:

I am traffic manager of the Central railroad; was superintendent of the Southwestern Railroad Company in 1882; I was responsible for the condition of the road-bed, which included the road, rolling-stock, etc. The track at the place of the accident was a stringer track; the stringers were under the rail, running the length of the rail, about six by nine inches, the iron being spiked to them; the stringer was fastened to the cross-ties with wooden pins. The one at that point was forty pounds steel rails, which were put down about eighteen months before; the rails were joined together generally with fish-plates. I suppose the road-bed was put down during 1860; the soil is very fine, hard, good soil for a road-bed; I saw the track several times during the eighteen months, but cannot say how long the stringers or cross-ties were put into it; it was in good condition; I think a train could run over that track with safety as fast as the engine could pull it; forty miles an hour is about the speed
34 for an engine ordinarily. As to the relative strength of the stringer compared to an all-rail track it depends upon the circumstances; some roads use as high as seventy-pound rail, but

for the traffic of this road the track is sufficiently strong; that is my opinion as an expert; there is great diversity of opinion; the older roads were built with stringers, because the rails were too light; from my knowledge of railroad building this track was a safe one, taking into consideration the accidents on this and on other roads. I was at the scene of the accident the next morning; could not discover the cause of the accident, though I made an examination for this purpose; I saw no rotten timber on the track that would cause the accident; there may have been some timber under the cars that I did not see; the rails were broken after the train ran off and the stringers and cross-ties were torn up for a couple of hundred yards; there was one wheel which struck against the stringer, which was a particularly good one, being hard timber; I could not tell whether the rail was broken before the accident or not; I saw the broken rail very near the point where the cars appeared to have gotten off; all that I saw were fresh breaks. Steel rails are more liable to be broken in cold
35 weather; there is no way known to prevent such breaks; it
is the best rail known; it is being used on all first-class roads; in a run-off it depends upon the speed of the train as to how much it tears up things. Those rails were bought in Pennsylvania. I think that all the rails we buy prove to be good ones. We regard Mr. Russell as a competent conductor and a discreet man. The engineer is regarded as a first-class engineer. I never inspected the wheels or the running gear of that particular train.

On cross-examination this witness testified as follows:

I have been in the railroad business twenty-five years. I have been engaged with this particular road twelve years or thirteen years. There has been no stringer track built in the last few years that I know of. The Central and its branches are the only ones I know of that use it. I do not know that they have been discarded because they are not safe for travel. The Mobile and Girard road has a stringer track. The Central does not control it. We are now replacing stringer tracks with tie track. One reason is that the damage to the property when the cars run off and the tearing up
36 of the track is less than with a stringer track. I think it
requires less care to keep up a stringer track. There are more pins, but less cross-ties. We have no more labor on that kind of a track than on a cross-tie track. It does not require more skill or care. I cannot say there were a number of accidents about that time. There were no more on that than on other roads of the same length. We do not have frequent run-offs. I have not counted the accidents. I arrived at the scene about six or seven o'clock in the morning. I do not know that they had burned up a good deal of the timber of the wreck. There was a force at work there the next morning. I examined the road a few months before the accident, I think; don't recollect stopping at that place. We travelled from six to eight miles an hour; at that place probably five, six, or seven on account of the grade. I presume the embankment was twenty-five feet high. I don't remember any of the cars lying bottom upwards; one or two were lying on their sides. The first-class car was

broken pretty badly; the sleeper was damaged about twelve hundred dollars' worth. The traffic over the road is a great deal heavier than
it was two or three years ago. The engine was very light.
37 We have been in the habit of running sleepers for the last
two or three years; in the last few years we have been running freight cars much heavier loaded than before; the first cars used were from sixteen to eighteen thousand pounds' carrying capacity and from sixteen to twenty thousand pounds in weight; they now have a capacity of forty thousand pounds and weigh from twenty to twenty-one thousand pounds; a forty-pound rail on a stringer track is not regarded as a very light rail; ours is the only road that uses the forty-pound rail that I know of. I made no charge against Mr. Russell; have no recollection of his saying that the track spread. I don't remember that Mr. Stephens called my attention to the fact that I was shown the old timbers, or that the stringers were rotten. One cause of a railroad train getting off the track is the widening of the track; the impetus of a train is to go straight ahead, and the rail on the outside is made higher than on the inside to overcome that impetus on a curve; the elevation of the rail would not have to be so great to prevent the train from going off at the rate of six miles an hour as if it was going at the
rate of sixty miles an hour; of course, the elevation is in pro-
38 portion to the velocity; it is not necessary for the elevation
to be made to keep it on the track; some roads make no elevation; it is just a matter of theory; I know that a train started in a straight direction will go in that direction until it is diverted; the wheel on the outside curve bears against the track on the outside with a sufficient force to change the direction of the course; if a wheel did not have flanges the train would not stay on a straight line; it is the flanges and the track that keeps the train from running off; the upward pressure is increased as the speed becomes greater and the pressure of the flange on the rail is increased; if there is a greater pressure there would be a tendency to widen the track; these bolts are all that keeps the track from widening; if the pins should decay of course there is no force to resist the tendency to spread; it is not necessary to put a stringer into a slot to prevent the spreading; without the pins it would not amount to anything; of course if there was a slot the weight of the wheel would press down upon it at that point; I don't know that it would be possible for the stringer to be pushed out with that weight on it; *of* that would be additional resistance; in some portions of the track
we have those notches; I regard it just as safe with-
39 out them; as to whether it would be more proper to have
them or not would be arrived at by experience; the wheel that I noticed particularly as having gotten off was on the outside of the curve; I don't know which wheel got off first; if the train had jumped the track because the elevation was not sufficient it would have jumped the outside rail first, I presume.

Redirect examination:

I saw a stringer that seemed to be the first point where the wheel struck on outside of the curve; it may have been a little out of position, but appeared to be in position; it was fastened to the track when I saw it.

Recross-examination:

The face of the wheel was from three and a half to four inches; the track would have to widen more than that to get them off.

Redirect examination:

The car-wheel was pressed on an axle by hydraulic pressure, and makes the same revolution as the axle; the outside rail on a curve is raised to resist the centrifugal force; there is less friction where the rail is raised; it is elevated so that engines can get around 40 with less power; curves resist the impetus of a train; we do not have an accident two or three times a week; we had as few comparatively as any road in the South; the stringer track is regarded as safe for traffic as the tie track; our engines are as heavy as the heaviest cars; the track is sufficiently strong to carry heavier machinery than we have got; Capt. Raoul is not the president of the Southwestern railroad; he is the president of the Central railroad.

(It was admitted that the Central railroad was the lessee of the Southwestern railroad.)

In answer to question of plaintiff — said: I have never operated any new railroad; I presume that the steel rails would be more likely to break in extreme cold weather than iron; it was very cold that day, but I don't remember seeing any ice.

41 A. L. Clifton, being sworn in behalf of defendant, testified as follows:

I am supervisor of the Montgomery and Eufaula railroad. I got to the scene of the accident shortly after it occurred; I carried an engine, a passenger car, and two or three hands; I was the first one there, I think; I brought the passengers back to Eufaula and then returned to straighten up the track about 8 o'clock at night; part of the track was torn up; I think the wheel mounted on the outside of the curve; of course, the wheel on the inside struck the stringer and the rail; there are signs where the wheel mounted the rail; the stringers were torn up for about two hundred feet; I could tell where the cars first left the rail; the stringer where the wheels first got off were good; I think the wheels mounted it and, of course, it was mashed; the stringer was on the track when I saw it—fastened to the track with wooden pins; the elevation of the outside rail is about two and a half to three inches. I have been at the business a little over fifteen years. I worked on the Southwestern in the years 1879 and 1880; I replaced the track there once, but did not

give it more elevation than it had before. We left a portion of the stringer where the wheel left the rail upon the track—the
42 part that wasn't mashed up; the stringers were twenty-four
feet long; it was a sound stringer, of good heart pine; it is hard to say how long it was on the track, but, judging from its appearance, it was about two years; a stringer will ordinarily last from five to six years; the cross-ties at that point were pretty good, and were able to support the track; the cross-ties were about three feet apart; that is a sufficient number of cross-ties for a stringer track; we put a pin in each end of the stringer; that was the way it was at that point; there was a little timber carried there, to take the place of some stringers; there was a pile of old lumber that had been taken out of the track that was used for building fires, etc.; we might possibly have used some for the present; I tried to ascertain the cause of the accident and made a careful examination; where it appeared to have climbed the rail the track was a good gauge; the stringer on that rail was a good stringer and was in position where the wheel mounted it; there were no signs of a broken rail at that point; there were some further on. I cannot tell what caused that accident; if there had been a spreading of the cross-ties the wheel would have mounted the track inside; the track was torn
43 up about the length of the train; when a train running thirty-
five miles an hour runs off on a stringer track it leaves the track in a pretty bad condition.

John Chambliss, being sworn in behalf of the defendant, testified as follows:

I am section-master from Eufaula to Harrell's Cut; we go over the track about once a month looking for bad stringers; walk and ride over it; I sound the timbers with an adz, and if they sound dead I take them up; if not, I leave them there; I sound all that according to my opinion need sounding; I sound every one that is likely to be rotten; if it looks good I don't hit it; if I find them decayed enough I take them out. I inspect the rails by looking at them; the rails are fastened together with clamps; sometimes the nuts work loose, and we do not know it; they do not all get loose at once; if they are very loose you can tell by looking at them; we go over the section once a week; sometimes we don't go there on account of other work, but we go sooner the next week. I was over the
44 day before the accident. I believe I put new ties there about
two weeks before, or maybe longer, and took out every tie necessary to be taken out. I examined the pins when I put in those ties; the rails, the stringers, and the pins were all good. I have repaired tracks about eight years. I commenced as a laborer, and have been section-master about four years. I always had as much lumber as I needed; at the time of the accident I had a good lot of cross-ties on hand. I didn't have so many stringers; I did not have a fixed number of stringers to put on a mile of track in a year; I always take them out, as they are necessary to come out. We go along and fill up all the low places in the road once a year and put

in cross-ties; and about once a month, or probably not so often, for stringers; sometimes I am over some portions every day, and sometimes it is a week before I see some portions. I had sufficient force to keep up the section. I work constantly. I make the pins with a pin-mold; when I make the pin too small I throw it away; sometimes I drive in a pin that is not exactly full all the way through, but that is seldom; the fastenings were all in place on the rails that were thrown off; the track was in good condition at the time of the
45 accident; I applied the gauge myself, and it was good; the
end of the stringer towards Georgetown was split; it was sound; there was a portion of it put back in the track until we could fix the track better; the track was in position where I applied the gauge; it was in as good condition along there as at any other point; I brought timbers there for the purpose of repairing the track; I think there were some old timbers brought there to assist in getting the cars back on the track.

Cross-examined:

My section is eight miles long; I had five hands; as quick as the lumber train throws off the stringers we go to putting them down; when it is delayed we wait; I have found some stringers I might have taken up if I had a stringer there, but I did not consider it unsafe. Once this spring I did put back a stringer that I had taken out; I never did it before; the downgrade commences at the wire bridge and runs to Jolly's wood rack; then there is a little upgrade, and then a downgrade to the place where the accident occurred. I generally drive the pins in myself; I can't say that I ex-
46 amined all of the timbers after the accident; I examined more
than one stringer; I went there to get the track in order; the inside rail was in position; the pins that fastened the cross-tie to the stringer were broken and some pulled out; I don't remember whether all the iron was pushed off or not; I saw two or three bar-lengths torn loose from the stringer.

W. M. Dickinson, being called for the defendant, testified as follows:

I am car inspector of the Central road, and have been for twelve years; I inspect the cars every day; I inspected the train that ran off the track on the seventh day of December, 1882, the day before it went out; I found nothing wrong with it; I have been in the railroad business twenty-seven years; I went between the cars to inspect them; I struck the wheels with a hammer.

T. G. Russell, being sworn for the defendant, testified as follows:

I was conductor on the train that ran off; I think we were running about twenty-five to thirty miles an hour; I have been running seven or eight years; I ran as brakesman and baggage-master
47 before I ran as conductor; I can get a very good idea of the
speed of a train while it is running.

On cross-examination this witness testified:

I was in the second-class car sitting on a seat; I was not talking to any one; I was looking out the window; I was not specially thinking about the speed of the train; we were a little behind time and I was thinking if we would get in on time; that was my second trip on that particular train; I was not a regular passenger conductor; I considered myself a good conductor; I did not tell Mr. Shropshire that the train ran off because the track spread; I think we were about ten minutes behind time; we were twenty minutes behind leaving Brown's station; I did not have to wait at Dawson; we had made up five minutes in eight miles; I think the schedule between Brown's station and Dawson is about twenty-minutes; the freight train was behind, too; we did not meet at all.

48 HORACE WILLIAMS, colored, being sworn in behalf of the defendant, testified as follows:

I was one of the track hands under Mr. Chambliss last December; the track where the accident occurred was in good fix; we had repaired the track the fore part of the week before and examined every tie and pin from one end of the stringer to the other, taking out old pins and putting in new ones; the track, the stringers, and cross-ties were all solid; we take a foot adz and hit every pin to see if it is sound, and whenever one gives away we put in another; I have been on that section five years. We commence working every Monday morning at one end and work all the week and then take one day to go over the road to see if it is all right.

On cross-examination this witness testified:

I don't know how much track we go over in five days; it was only one time that we put down timber we had taken up; that was a sound stringer, but was split, and we sawed off a piece; that was either before or after the accident.

Defendant then closed.

49 A witness named THOMAS LANCASTER, being sworn in rebuttal for plaintiff, testified as follows:

Prior to the accident I had been section boss on the adjoining section. I passed over that section where the accident occurred once a month in going to Eufaula—sometimes on a hand-car—and would walk the biggest part of the way in going back home. I went to the scene of the accident between night and midnight; I did not notice the track much until next evening. I found several stringers split up, and where the train first got off they had put in a piece of stringer. I found a low place where the train jumped off the track. The dash of a train seems to push the track out of line and make a sharper curve than before; the grade wears off and the track keeps settling down until it gets in that position, and the train would dip in this low place and worry it out of line, and got out of line at this point. We raised the track there from two to three inches. Right at that point I didn't see any rotten timber; there was some rotten timber along the road in the same section and in the vicinity where the accident occurred.

(Defendant, by its attorneys, objected to the testimony as
50 to the condition of the road at any point than that of the accident. The objection was overruled. Defendant, by its attorney-, excepted.)

I didn't see any rotten timber along there that would have given away; I pushed the track in line; I did not see a mark on the rail where the train first got off; the train appeared to leave the track at the deepest place; the iron was torn up from there on. I have been discharged by the railroad.

This witness testified on cross-examination as follows:

You could have seen that depression in going along on any low thing; I think you could have seen it on a pole-car; it did not look like a man who had experience and looking for such things could have failed to see it while riding on an engine; it would be impossible for him not to have noticed it if he had been looking for such things. I found the depression after the track had been temporarily repaired. The old ties had not been taken up. From the centre of this depression back the way it was going it tore up the left-hand side of the track. It seems to me that the force of a train is greater when it strikes the point of [a] curve going out or coming in; after it comes in it becomes more uniform and doesn't effect the condition of the track
51 so much; the accident occurred at the point of the curve towards Eufaula. I do not know that it was one hundred and fifty feet from the point of the curve. I don't think it more than a stringer length or two from the point of the curve. I suppose the engine was three or four hundred feet beyond the point of the curve; sometimes the cars run off and the engine passes over; there are some accidents that we never know how they occur. I think the two rails were on a level at the place of the depression; if anything, the outside was the lowest. I think a man who was acquainted with keeping up a track in a curve would have noticed that depression.

On re-examination this witness testified as follows:

The road kept getting down until it got out of line; a track on an embankment is more liable to wash away than elsewhere. I have never seen Mr. Clark drinking. I do not have any idea that he would notice things if he rode on an engine with the engineer, fireman, and a little boy. The dirt is rounded off on the outside of the track. When there is a low place the track will keep creeping. I do not know where the slack of a track commences at.

52 JOHN MOORE, being sworn in rebuttal for plaintiff, testified as follows:

I reside at Hatcher's station, a little over a quarter of a mile from the road. I frequently walk to Georgetown. I pass the place where the accident occurred. I would go to Georgetown once or twice a week. I thought the track along there was in a decaying condition.

In answer to a question of defendant this witness said:
I cannot tell you the life of a cross-tie or stringer.
In answer to a question by plaintiff this witness said:

I think I know a piece of decaying timber when I see it. I have known the condition of the road for 12 years. In '82 it was in a decaying condition; more so than for years before; it ran through my farm. My farm is six or seven miles from where the accident occurred. I don't know how many rotten ties were in that curve. I have been getting cross-ties; the sap decays some time before the heart; the sap will decay in one, two, or three years; the heart will last five or six years. I have been a farmer all my life, and
53 have been in the timber business, farming, and otherwise, for fifty years; by saying that the ties were in a decaying condition I mean that they were in an unsafe condition for the purpose for which they were used. I have never kept up a railroad, but have used timber on a farm; it would be all conjecture with me as to the length of time a cross-tie would last.

The defendant, by its attorneys, objected to the testimony of this witness as to the condition of the track at other places than that at which the accident occurred, and moved the court to rule out and exclude from the consideration by the jury testimony of the witness upon that point, because such testimony was irrelevant, illegal, and immaterial to the issue. The objection was overruled and the motion denied, to which ruling and denial by the court the defendant, by its attorneys, excepted.

One HATCHER, being sworn in rebuttal for plaintiff, testified as follows: I live at Hatcher's station; I am twenty-four years old. I passed over Mr. Chambliss' section several times on the train and walked over it twice in the last eighteen months. I walked over the track on the 21st of Nov., '82, from Hatcher's to Georgetown.
54 I cannot say anything about this immediate place where the accident occurred. I noticed decayed timber within a mile of this place. I might have seen it right at that place. I noticed the tie-heads being off. I noticed it was decayed. I was with the boss of the adjoining section. I don't undertake to locate the place where I saw the decayed track. I can tell a rotten piece from a sound piece of timber.

When cross-examined the witness testified as follows: I can't locate the place of the decayed timber nearer than a mile. I never observed the track any closer at this point than anywhere else. I can't say whether I saw any cross-ties with the heads rotted off at this particular point or not.

The defendant, by its attorneys, objected to the testimony of this witness as to the condition of the track at other places than that at which the accident occurred, and moved the court to rule out and exclude from the consideration by the jury the testimony of the witness upon that point, because such testimony was irrelevant, illegal, and immaterial to the issue. The objection was overruled and the motion denied, to which ruling and denial by the court the defendant, by its attorneys, excepted.

55 TAYLOR MOORE, being sworn in rebuttal for plaintiff, testified as follows:

I live about seven miles from where the accident occurred and about three-quarters of a mile from the railroad. I have lived there twelve years, and have been on the road once a week for that time; just before last December I went on it once a week. I was walking from Hatcher's station to Georgetown on business. I thought the track just about where the accident occurred unsafe; the timbers were not sound; a great many cross-ties were rotten. I have had no experience in timbers except about the plantation. I can tell a rotten piece of timber.

The defendant, through its attorneys, objected to the testimony of this witness as to the condition of the track at other places than that at which the accident occurred, and moved to rule out and exclude from the consideration by the jury the testimony of the witness upon that point, because such testimony was irrelevant, illegal, and immaterial to the issue. The objection was overruled and the motion denied, to which ruling and denial by the court the defendant, by its attorneys, excepted.

56 J. E. SMITH, being sworn in rebuttal for the plaintiff, testified as follows:

I live at Hatcher's station; I have been living there seventeen years. I walked over the place where the accident occurred about two months before. I don't know that I noticed that point any more than any other; it might have been right there or a little ways east or west. I thought it was unsound from rotton timbers. I have been using timbers on my farm for forty years; if a piece of timber was much decayed I would notice it without close inspection; with close inspection I could tell a slight decay; this decay was mainly confined to the cross-ties; it might have been right at that point, and it could not have been very far from there. I went to the scene of the accident the next morning between eight and nine o'clock. I saw some broken timbers that seemed to be split up. I did not see any new stringers or cross-ties.

The defendant, through its attorneys, objected to the testimony of the witness as to the condition of the track at other places than that at which the accident occurred, and moved to rule out and exclude from the consideration by the jury the testimony of the wit-

ness upon that point, because such testimony was irrelevant,
57 illegal, and immaterial to the issue. The objection was over-
ruled and the motion denied, to which ruling and denial by the court the defendant, by its attorneys, excepted.

C. A. STEVENS, being sworn in rebuttal for plaintiffs, testified as follows: I live in Eufaula and am a building contractor; have been at that business ten years; I think I understand timbers. I went to the scene of the accident on the afternoon of the day after it occurred; I did not make a critical examination right where the accident occurred; it had all been fixed up when we got there; Maj. Shellman and others were there and showed us the best they could how they thought the thing happened; the timbers in the track where the accident occurred were apparently good timbers; I saw twelve or fifteen stringers lying on the road-bed that they said were stringers that were in the track; they were broken and split; some was very good, sound timber and others showed some little signs of decay; I asked Mr. Hudson, the road-master, if those were all that came out of the track; he said he believed it was; I said there ou-t
to be some more; there didn't seem to be enough there to
58 fill the space; he said he guessed the boys had burned up
some; I told him I thought if they were going to show us what came out of the track we ought to see them all; they didn't take any more pains to show me anything; I looked down and saw part of a stringer in the fire and asked if that was one; he said he didn't know; I told him if it was he ought to have burned it before; it looked to be very badly decayed; I walked up and down the track for some distance; I found stringers at both ends of the place where the wreck occurred that I considered unsound; in one place I put my foot on a pin and saw it moved, and I took my knife and stuck it down in the pin and the pin was rotten; when I pulled out my knife the pin came with it—about four inches of it; that was on the end towards Macon, within one hundred and fifty yards of where the accident occurred; I kicked some of the stringers as I walked along; I found some very sound ones and others that sounded hollow, and I saw what I considered pretty weak places and took a little switch and stuck it down into some of them two or three inches perhaps; I kicked off some pieces five or six feet long; I think
59 that was on the track on the other side of the wreck; I shoved
the stick into stringers in several places; the stick was like a riding switch, green sweet-gum, I believe.

GEO. C. MCCORMICK, sworn in rebuttal for plaintiff, testified as follows: I am a merchant, and reside in Eufaula. I went over Sunday evening to where the accident happened. I didn't make a critical examination. I saw a rotten pin lifted out of a hole by some one. I saw about the wreck what I took to be decayed timber. It might have seemed sound to a railroad man, but it looked rotten to me. I saw a rotten place on the end of a stringer.

J. H. Gail, being sworn in rebuttal for the plaintiff, testified as
follows: I reside in Baltimore. I was on the train that ran off. I
was informed by the conductor that the train was thirty minutes
behind time about midway between Smithville and Georgetown.
They commenced running at an unusual speed for those roads. I
am on the road about eleven months in the year. I should think
they were running thirty to thirty-five miles an hour, and may
have been going faster. I was in the first-class coach. The train
went down endways and turned bottom upwards. I got out
60 after the accident and went upon the track. I was not long
in observing that where the cars left the track one stringer
that was rotten, and, of course, the cars had to go off, as there was
nothing to hold them on. I picked part of it up & crushed, and
showed it to number of strangers there. Afterwards, I lit it and
built a fire and burned portion of it and other debris of the wreck
which was badly decayed.

Cross-examined;

It was rotten through. That is my explanation of the accident. It appeared to be rotten in the middle. It was all broken to pieces. This stringer was just about where they got off the track; just at that very point. It crumbled up in my hands. The rail on that stringer was bent up and thrown out from the track & torn entirely loose. I am travelling for a New York house. The accident occurred about four o'clock. I had looked at my watch a few minutes before that. I was not injured. I have no interest in this case.

T. M. Lowry, being sworn in rebuttal for pl'ff, testified as follows:

I am a minister, and reside in Eufaula. I was on the train
61 that ran off. We were behind time at Brown's station, it
seems to me, about twenty-five or thirty minutes. I was sitting by the stove and felt a strange action of the cars. I noticed
that the train seemed to shove forward suddenly and the car in
front of me went down. I was thrown right up against the car and
was stunned, and I don't know what took place after that. When
I recovered I was on my face under the broken part of the train.

The foregoing was all the evidence in the case. All of the foregoing exceptions were taken in open court before the jury had retired from the bar of the court.

The court then charged the jury as follows:

Charge of the Court.

Friday, *December* 21, 1883.

Gentlemen: The plaintiff, James C. McKenzie, brings his suit against the defendant, The Georgia Central R. R. Company, which, I believe, operates the Southwestern railroad, as it is called, for damages on account of injuries received by him while a passenger in a car and upon the road of the defendant.

The admitted facts are that the plaintiff McKenzie took
62 the train upon the defendant's road at a place called Cuthbert, in the State of Georgia; that he bought his ticket and paid the fare; that he occupied a place in one of the cars of the train, and that when the train had proceeded westward from Cuthbert towards Eufaula, Ala., and within a few miles of Eufaula, Ala., at a place where there was a curve and a downgrade, *that* the cars were from some cause precipitated from the embankment, some of them very much broken-up, and that this plaintiff was then and there injured, and also other persons who were passengers upon the cars. The accident having occurred as shown and not denied, and the injury resulting therefrom, and it is not denied—the injury to this plaintiff, I mean—the presumption of law arises that the defendant railroad company is responsible to the plaintiff in damages for such injury. There is no question arising here as to the conduct of this plaintiff contributing to the injury. He was in his proper place, a passenger in the car and upon the road of the company, and no question is made and none arises as to whether there was on the part of this plaintiff anything in his conduct contributing to this injury. The case, then, stands before you as one
63 for damages—that is to say, the *prima facie* case stands before you as one for damages.

The accident having occurred and the injury having resulted therefrom to the plaintiff, the question is, first, negligence on the part of the defendant company. Is it shown, or is the contrary, due diligence, shown? That is the first point and that is the main point; that is the question upon which most of the time of the court has been consumed. Of course there is another question back of that, and that is the measure of damages, which I will come to after awhile. The rule is laid down in the statute of the State of Georgia, where this accident happened, for it did happen in the State of Georgia, and it is claimed and conceded that this case is governed by that law, but I apprehend the law to be very much as it is stated in the statute of the State of Georgia, and if we do without this statute I would perhaps in this place and in this case formulate a law as nearly as I can as has been formulated in the statute of the State of Georgia. Different words are sometimes used to express the same idea, and different words often convey different shades of the same idea, and some comment has perhaps arisen upon this subject of negligence as to the language in which the idea has been expressed by the various courts
64 in the various parts of the country, if not even by legislative bodies. The rule as given by the statute of the State of Georgia is before me. It has often been referred to in the progress of this case, and I refer you to it again, as I think it will furnish you the true rule by which you will determine what is, perhaps, the main question in this case—that is to say, the question of negligence, or no negligence, as the facts have been proven before you on the part of the railroad company. Will you give your attention to this carefully?

"A carrier of passengers is bound also to extraordinary diligence on behalf of himself and his agents to protect the lives and persons of his passengers."

Now, it might be stated differently; it is stated differently in many of the authorities that have been read—that is to say, different words have been employed, but the same idea substantially runs through them all.

The Supreme Court of the United States, in a comparatively recent case, has given us a deliverance upon this subject as to the rule which is to be observed and by which the responsibility of railroad companies who carry passengers is to be determined, and they say:
"These and many other adjudged cases cited in approved
65 and elementary treatises of acknowledge- authority show
that the carrier is required, as to passengers, to observe the utmost caution, characteristic of very prudent, careful men. He is responsible for injuries received by passengers in the course of their transportation, which might have been avoided or guarded against by the exercise on his part of extraordinary vigilance;" using the same word that is used in the statute of Georgia, "extraordinary vigilance, aided by the highest skill. This caution must necessarily be extended to all departments, or means employed by the carrier in the transportation of passengers." This case here has reference mainly, I take it, to the track of the defendant railroad company, and the same rule of the Supreme Court applies here to the car and its appliances; applies equally to the road-bed, and to the track of the railroad company. That duty the law enforces with great strictness; for the slightest negligence or fault in this regard from which injury results to the passenger is liable in damages, and I apprehend it to be the correct rule. When treating upon this subject and discussing this subject of transportation of passengers by the means of steam, which is in its nature dangerous if not governed properly
and with great care, there is, perhaps, scarcely such a thing
66 as slight negligence, because where the interests are so great
life is involved, and personal safety and security is involved, and slight negligence under such circumstances, when there is such responsibility resting upon the carrier, becomes indeed gross negligence in the eye of the law.

To recur now to the statute of Georgia. Whether you say the utmost care, the highest care, or extraordinary care, we mean about the same thing, and the statute of Georgia, "A carrier of passengers is bound to extraordinary diligence on behalf of himself and his agents to protect the lives and persons of his passengers." "Extraordinary diligence." There are a number of books here which I have examined. It is sometimes stated "utmost care" and "very highest care," and in one case, a case from the Supreme Court of the United States, it is "the highest possible care," "greatest possible care and diligence," so that you see the rule upon this subject, as bearing upon railroad companies, is rigorous and stringent.

There is no indication in any of the authorities that have been cited that there has been recently any relaxation of the rule, but, on

the contrary, it is maintained with rigour, and the reason of
67 that is because the rules upon this subject which applied to
the transportation of passengers by the old stage method were not sufficient when applied to transportation of passengers by means of steam and dangerous agencies of that kind. Even more care and more caution, more skill and more diligence, are required now with our present means and facilities for transportation than were required in former years before transportation was carried on in this way.

I think, however, gentlemen, that I should state *that I should state* this to the jury. Some reference must be had to the business of the corporation, to the railroad company, to the character of the business it carries on; whether, perhaps, it is a main line used by a great many people or whether it is, perhaps, some branch line used by comparatively few people.

Some confusion might arise from saying that the railroad company is bound to use the utmost diligence, to go to the very verge of diligence, and it might be said that that rule was to be applied to one road as well as another, without any reference whatever to the business and character of the business which the road should perform or be engaged in. I think upon that subject it is proper to
say that the jury may have some regard to what is reasonable
68 and practicable in the application of such a rule.

To illustrate what I mean, take the present case we are now considering. It would be possible to renew the ties every year; it would be possible to renew the stringers every year or every month, but that would, perhaps, be hardly reasonable to require that to be done. Experience, perhaps, does not show that that is necessary to be done. In the Georgia case that has been cited, where, you will remember, there was a bull upon the track, and the cars ran against the animal and an accident resulted and a person was injured, it would be possible. It might have been possible, of course, to fence this track to have kept the bull off the track; it might have been possible to have stationed *a man* along the line of this road through its entire length—every few paces, for that matter—and yet that is not what the law means by the utmost diligence; so that I think I should say to the jury, and do say, that while I apply this rule and do not relax it yet that it must be applied reasonably and with reference to the circumstances of the case, and with reference to what is practicable, because we are dealing here, gentlemen, with a practical
subject, and not merely with the idea.

69 I may make one further remark in relation to this curve.
It has been shown before you by this expert testimony that while science—mathematical science—has accounted for how this centrifugal force may be overcome, yet, practically, it is impossible—always, perhaps, impossible—to construct a track so that it shall be perfect and that there shall be no danger whatever because it has been established in ideal perfection. That is not to [be] expected, and that is not the measure of diligence that is required of a railroad company. It is not perfection, but it is the highest care and diligence, aided by the highest skill.

The next proposition of the statute of Georgia which I desire to remark upon is this: After saying that a carrier of passengers is bound *is bound* also to extraordinary diligence on behalf of himself and his agents to protect the lives and persons of his passengers, disjunctively —, "but he is not liable for injuries to the persons after having used such diligence *after having used such diligence*." Now, the question is, Did this railroad company use such diligence in this case? Is this shown by the evidence or is the contrary shown—that they did not use diligence—that they were, in fact, careless? It matters not, and it is not really important to enquire, what the competency of these officers of this railroad com-
70 pany was, how skillful they were, unless they used that skill,
unless they used that care. If they were men that had this prudence, this skill that is required, from the superintendent of the railroad down to the brakesman, through all the grades —. They may have been all skillful men, but did they apply their skill? They may have been cautious, but did they apply this caution? Did they, in the language of this statute, use the diligence that this rule required? If they did, if they came up to this rule, and the accident occurred nevertheless, then I suppose that the accident would fall among that number or in that class of accidents which are regarded as inevitable, which are regarded as accidents which the greatest care could not prevent, and which the greatest skill and foresight could not guard against.

A great deal of testimony has been introduced, gentlemen, upon the subject of negligence, or, rather, I should say, by the defendant in this case, to repel and disprove the presumption of negligence, arising from the fact of the accident having occurred and the injury having resulted to the plaintiff; a great deal of testimony, I say, has been introduced by the defendant in the case, and counsel for the defence recognized the *onus* or burden which lay upon
71 them that they must repel this *prima facie* case made by this
plaintiff, and show, in the language of the statute, *show* that they are not liable for the injury to the person, because they have used extraordinary care and diligence. Much testimony has been introduced and many witnesses have been examined, most of whom are connected with this railroad company, but not all of them, to show that this road was in good order, that it was well operated, that the track was properly laid, that the timbers in it were sound, and that no fault or negligence, not even slight, could be laid at the door of this corporation, its officers and agents, in respect to this road, particularly at this portion of the road at which this unfortunate accident occurred.

On the other hand, there is evidence to rebut this and to show that this road at this point was not kept up and maintained in good and safe order. To descend a little into particulars, only a little, because I leave the facts for the jury and do not propose in any case to trench upon the duties and responsibilities of the jury to find the facts of the case—but the plaintiff says no; that this road at this point was not maintained in a safe condition for the trans-
72 portation of passengers in the light of the rule which I have

given you; that it had in it, at and about this point, rotten ties. I may stop a moment to say that the question of the matter of the ties upon which the road is laid is an important matter of course. Any one can see that. It is important that these cross-ties should be sound. Much testimony is introduced to show that they were not sound, but, on the contrary, were in a state of decay, in a state of very considerable decay, such as to render them unsound. I do not dwell upon the testimony upon this point about the rottenness of them, also *that* these stringers upon which the rails were laid, because it appears that this road is what is called a stringer road, and indeed until this case arose I was not aware that this road — constructed in that way. But now the question, What does the evidence show in regard to the timbers in this road; because whether you have reference to the ties, or whether you have reference to the stringers, it must appear evident to any one that it is quite important to the safety of the transportation of passengers that these timbers should be sound; that they should be thoroughly sound; that they should not be such as to give away when trains 73 pass over, because trains are weighty and heavy, as has been shown here, although, perhaps, the evidence shows that the locomotives used on this road are not as heavy as those used on other roads.

Now, gentlemen, it is for you to determine whether this accident resulted from the fault or negligence or carelessness, even slight carelessness, of this defendant railroad company. If,in the exercise of the utmost diligence and skill, as the rule is laid down—extraordinary skill and care, as laid down in the Georgia statute—the officers of this road could have found out that these ties or stringers were insecure, then they were in fault in not substituting secure ones for them. If, however, the defect, if defect there was, was such that it could not, by the exercise of this extraordinary care and diligence, be found out, be ascertained with the means they had at their command to ascertain it, then I take it for granted that the railroad company is not liable, because the law does not require omniscience on the part of the officers of railroad companies, and it does not require impossibilities; but it does require and does exact, and it will be satisfied with nothing less than, extraordinary care and dili- 74 gence to see that all the timbers in the construction of the road are safe and sufficient for the safe transportation of the passengers whom it invites to travel and be transported over its road.

This, then, gentlemen, is the test, or rather I should say it is the rule, by which you are to determine whether the evidence in this case shows that this defendant railroad company, its officers and agents, were at fault, for if these timbers were insecure, and they might have known it by the exercise of this extraordinary skill, then they cannot shelter themselves by saying that their officers were competent men; if I may be allowable to use a scriptural expression, "They must show their faith, their competency, their diligence, their care; they must show it by their works."

I do not know, gentlemen, that there is a great deal of law upon this subject. A great many cases have been cited, but I do not know that I could make it clearer if I should dwell upon them, and the question is now tested by this rule which I have given you and the evidence from the stand, and it is for you to determine was there negligence here which resulted in this accident on the part of this railroad company, its officers and agents — even slight negligence ; if
so, they are liable. Now, it is true, when people travel on a
75 railroad, they take some risk in doing so, for risk attends
that kind of transportation, but they do not take the risk
that follows unskilfulness and want of care of the officers in charge of the operation of the road ; but, on the contrary, the law requires, for the safety of the people who seek transportation in that way, that these officers and agents should perform their duties with care and with diligence and with the skill which has been expressed in these rules I have given you. Now, there are a great many prayers here which have been asked both on the part of the plaintiff and the defendant. Some of them, I believe, have reference to the question of negligence—most of them; some of them have reference to the question of damages; and, perhaps, I had better in my main charge conclude what I have to say before I refer — which the parties have made.

If, then, you get a correct apprehension of the rule which is to govern in determining the question of negligence, then the next point is, if you should be of the opinion that there was no negligence, not even slight negligence ; that the officers and agents and
employes had performed their duties up to this rule that has
76 been given you, if you say there was no fault on the part
of this defendant railroad company, then, of course, you should
find for the defendant. If you should believe from the testimony, in the light of the rules I have given you, that there was fault, and that this road was not what it ought to have been, that there were rotten timbers in the road which imperilled the safety of passengers who traveled over it, or that the grade of the road was not kept as it ought to have been, and that upon this curve, instead of the outside rail being higher than the inside rail by the space of three inches, it was, in fact, level, and that, as one of the witnesses expressed it, the dash of the car had driven out the gravel from under the ends of the ties, and that that produced the result—if you should be of the opinion that this road was at fault, that this fault conduced and brought about this accident, then the question arises how much is this plaintiff entitled to in this action ?

What is the rule by which you are to determine the question of damages—that is to say, the quantity and amount of damages ? I will remark that it is compensatory damages. No other is claimed here. Damages to compensate him for the injury he has received,
and not damages to punish the railroad for the negligence that
77 is claimed to have existed here ; compensatory damages, then,
is what is claimed. A number of elements enter into this
matter of compensatory damages. I find them stated here in the books, and they comprehend several distinct things—loss of time,

loss of business, capacity — earn money, expenses of cure, expenses of nursing, and perhaps others, and these last are to be taken into consideration not only for the time that has elapsed between the accident and trial of the suit in point, but if the injury is of such a character as that the disability imposed by it extends into the future and requires medical aid and attention, and involves the continued loss of *in*ability to conduct business and make his services valuable, the jury will consider his prospective loss as well as his actual loss.

I find it stated here: "A party injured may recover in one and the same suit compensation for the disabling effects of the injury."

In estimating damages the jury may consider the extent of the injury and whether it is permanent or not, or will require treatment or nursing, because [to] this may be added the loss of time and the incapacity to labor in the future, the physical and mental suffering.

So you see, gentlemen, you look to the future as well as to
78 the past, if the evidence shows that his condition of health
and business incapacity and his pain and suffering will probably extend into the future, as well as his injury from the time of the accident until now.

A question has arisen in my mind in the trial of this case which perhaps does not call for a decision from me now, because what is claimed is the damages to which he may be entitled by reason of the loss of capacity to earn money, make gains; that this is to be considered during his lifetime, and I apprehend that beyond that there is no claim. The fact that occurred to my mind was, whether there might not even be a claim beyond that, because if a person is damaged and the result of the injury is the shortening of life—whether the testimony might not show, according, perhaps, to life-tables, which might be produced, but which are not produced, how long a person of a given age and sound health, if such be the fact, without any chronic disease, or disease that is likely to produce death in a short time, how long such a person would probably live. That probably might be considered to be within the domain of
speculative damages and possibly could not be sustained
79 in the courts. But I need not discuss any question
that does not arise, because that is not claimed here, and yet if you consider the subject merely in regard to the probable term of the plaintiff's life, as shown by the testimony, if there is any testimony upon that subject, I find an instruction asked for on this point by the defendant to the effect that there is no testimony that the jury cannot base a verdict upon anything but the testimony; but then I am unable to say there is no evidence in regard to the probable duration of the life of this plaintiff. I think that a fair construction of the testimony of these physicians upon the subject throws some light upon it. I could not say there was no evidence; certainly there was evidence tending to show the effect of the injury upon his health, and that the tendency of it was to shorten his life.

I wish to say upon this point that although it may be difficult to determine what in dollars and cents would be the compensation of

this plaintiff for the pains, physical and mental suffering, although
it may be uncertain how long this plaintiff will live, yet you will
not therefore say that it cannot be done, and that you can make no
computation, no compensation in dollars and cents for such
80 pains and sufferings. The difficulty of the matter does not
prevent you from taking it into consideration in your verdict,
if there is any evidence upon which you can base a verdict.

(The court read the definition of "extraordinary diligence.") You will observe that that statute is in relation to bailments. Now, if the Legislature had been fixing a law in regard to extraordinary diligence, as used in reference to the carrying of passengers, I apprehend they would not have used the words "in securing their own property." Therefore, I think some confusion has arisen in the instructions which have been asked by counsel for the defense upon that point, because this is in relation to the law of bailments, and it would not be so expressed if it had been formed in view of the rule to be applied to common carriers.

The defendant, by its attorneys, excepted to that part of the foregoing charge of the court, which is in the following language, to wit:

When treating upon this subject and discussing this subject of
transportation of passengers by the means of steam, which is
81 in its[elf] dangerous if not governed properly and with great
care, there is perhaps scarcely such a thing as slight negligence, because where the interests are so great life is involved, and slight negligence under such circumstances, when there is such responsibility resting upon the carrier, becomes indeed gross negligence in the eye of the law.

This exception was taken in open court before the jury retired from the bar of the court.

The defendant, by its attorneys, excepted to that part of the foregoing charge of the court which is in the following language, to wit:

If you should believe from the testimony in the light of the rules I have given you that there was fault, and that this road was not what it ought to have been, that there were rotten timbers in the road which imperiled the safety of passengers who travelled over it, or that the grade of the road was not kept as it ought to have been, and that upon this curve instead of the outside rail being higher than the inside rail by the space of three inches it was, in fact, level and that, as one of the witnesses expressed it, the dash of
the car had driven out the gravel from under the ends of the
82 ties, and that that produced the result; if you should be of
opinion that this road was at fault, that this fault conduced and brought about this accident, then the question arises, How much damages is this plaintiff entitled to in this action?

This exception was taken in open court before the jury retired from the bar of the court.

The defendant, by its attorneys, excepted to that part of the foregoing charge of the court which is in the following language to wit:

In estimating damages the jury may consider the extent of the injury, and whether it is permanent or not or will require treatment or nursing, because this may be added, the loss of time and the incapacity to labor in the future, the physical and mental suffering. So you see, gentlemen, you look to the future as well as the past, if the evidence shows that his condition of health and his business incapacity and his pain and suffering will probably extend into the future as well as his injury from the time of the accident until now.

This exception was taken in open court before the jury had retired from the bar of the court.

83 The defendant, by its attorneys, excepted to that part of the foregoing charge of the court which is in the following language, to wit:

In estimating damages the jury may consider the extent of the injury, and whether it is permanent or not or will require treatment or nursing, because this may be added, the loss of time and the incapacity to labor in the future, the physical and mental suffering.

This exception was taken in open court before the jury retired from the bar of the court.

The defendant, by its attorneys, excepted to that part of the foregoing charge of the court which is in the following language, to wit:

So you see, gentlemen, you look to the future as well as to the past, if the evidence shows that his condition of health and business incapacity and his pain and suffering will probably extend into the future as well as his injury from the time of the accident until now.

This exception was taken in open court before the jury retired from the bar of the open court.

84 The court further charged the jury as follows, to wit:

Although the plaintiff makes out a *prima facie* case of negligence against the defendant by showing the accident, and the plaintiff was injured in consequence thereof, and such proof puts the *onus* upon the defendant of showing that it was guilty of no negligence, this presumption of negligence may be rebutted by showing that the defendant in providing cars and roadway for the conveyance of its passengers and operating its road had exercised the utmost caution characteristic of very prudent and careful men, and if the jury believe from the evidence that the defendant did exercise such care and prudence in respect to the operation of its road and keeping up its roadway, then the defendant is not liable to the plaintiff for the injuries he received in the accident.

The defendant, by its attorneys, excepted to this charge of the court to the jury, and this exception was taken in open court before the jury retired from the bar of the court.

The defendant, by its attorneys, prayed the court to charge the jury as follows, to wit:

85 The care, skill, and diligence required of carriers of passengers must be proportionate to the danger of their particular mode of conveyance, but they are not insurers against all

accidents, and the passengers take all the risks incident to the mode of travel. This doctrine is not to be construed as meaning that the carrier must adopt all the precautions that an ingenius mind suggests or have all the skill that science can give, nor that he must use all the precautions which after the accident has happened it can be seen would have sufficed to avoid it, nor even must he use such precautions as one would use who knew beforehand that the accident would otherwise certainly occur.

The court refused to give this charge to the jury as prayed for by the defendant, by its attorneys, and the defendant, by its attorneys, excepted to the refusal of the court to so charge the jury, and this exception was taken in open court before the jury retired from the bar of the court.

The court, in lieu of the foregoing request to charge, further charged the jury as follows, to wit:

The care, skill, and diligence required of carriers of passengers
must be proportionate to the danger of their particular mode of
86 conveyance, but they are not insurers against all accidents,
and the passengers take all the risks incident to the mode of
travel. This doctrine is not to be construed as meaning that the carrier must adopt all the precautions that an ingenius mind suggests, which have not been brought into approved use, nor that he must use all the precautions which after the accident has happened it can be seen would have sufficed to avoid it, nor even that he must use such precautions as one would use who knew beforehand that the accident would otherwise certainly occur. Omniscience is not required of railroad officers or employés.

The defendant, by its attorneys, excepted to this charge of the court, and this exception was taken in open court before the jury retired from the bar of the court.

The defendant, by its attorneys, prayed the court to charge the jury as follows, to wit:

A common carrier is not liable for the safety of passengers to the same extent that a common carrier is for the safety of property. He does not insure the safety of passengers, nor is he responsible for
injuries suffered by them from any cause other than his own
87 or agent's negligence or wilful wrong.

The court refused to give this charge to the jury as prayed for by the defendant, by its attorneys, and the defendant, by its attorneys, excepted to the refusal of the court to so charge the jury, and this exception was taken in open court before the jury retired from the bar of the court.

The court, in lieu of the last of the foregoing request- to charge, further instructed the jury as follows, to wit: A common carrier is not liable for the safety of passengers to the same extent that a common carrier is for the safety of property. He does not insure the safety of passengers, nor is he responsible for injuries suffered by them from any cause other than his own or agents' negligence or wilful wrong, but extraordinary diligence, care, and prudence is required, aided by the highest skill.

The defendant, by its attorneys, excepted to this instruction of the court to the jury, and this exception was taken in open court before the jury retired from the bar of the court.

88 The defendant, by its attorneys, prayed the court to charge the jury as follows, to wit: The running off of a train is *prima facie* evidence of negligence on the part of the officers or employés of the road, and when this is shown and nothing more the presumption is that the negligence of some person connected with the road caused the accident. But this presumption is a slight one and easily rebutted, as there are a considerable number of cases of runs off in which there is no negligence.

The court refused to give this charge to the jury as prayed for by its attorneys, and the defendant, by its attorneys, excepted to the refusal of the court to so charge the jury, and this exception was taken in open court before the jury retired from the bar of the court.

The defendant, by its attorneys, prayed the court to charge the jury as follows, to wit: While the compensation of the injured party will not be confined to his pecuniary loss, but may embrace recompense for the pain and suffering of both mind and body which have resulted from the injury, and the jury may take into consideration future as well as past physical pain and suffering. But to
89 justify them in doing so it must be made reasonably certain
that such future pain and suffering are inevitable, and if they be only probable or uncertain they cannot be taken into the estimate.

The court refused to give this charge to the jury as prayed for by the defendant, by its attorneys, and the defendant, by its attorneys, excepted to the refusal of the court to so charge the jury, and this exception was taken in open court before the jury retired from the bar of the court.

The defendant, by its attorneys, prayed the court to charge the jury as follows, to wit: Although the plaintiff makes out a *prima facie* case of negligence against the defendant by showing that the cars left the track, and that he was injured in consequence thereof, and such proof puts the *onus* upon the defendant of showing that it was guilty of no negligence, this presumption of negligence may be rebutted by showing that the defendant in providing cars and roadway for the conveyance of its passengers had exercised all such care and prudence as very discreet persons exercise in the management of their own private affairs. If the jury believe from the evidence that the defendant did exercise such care and prudence
90 in respect to its cars and roadway, then the defendant is not
liable to the plaintiff for the injuries he received in the accident.

The court refused to give this charge to the jury as prayed for by the defendant, and the defendant, by his attorneys, excepted to the refusal by the court to so charge the jury, and this exception was taken in open court before the jury retired from the bar of the court.

The court, in lieu of the last of the foregoing request- to charge, charged the jury as follows: Although the plaintiff makes out a *prima facie* case of negligence against the defendant by showing the

accident and that plaintiff was injured in consequence thereof, and such proof puts the *onus* upon the defendant of showing that it was guilty of no negligence, this presumption of negligence may be rebutted by showing that the defendant in providing cars and roadway for the conveyance of its passengers and operating its road had exercised the utmost caution characteristic of very prudent and careful men; and if the jury believe from the evidence that the defendant did exercise such care and prudence in respect to the operation of its road and keeping up its roadway, then the defend-
91 ant is not liable to the plaintiff for the injuries he received in the accident.

The defendant, by its attorneys, excepted to this charge, and this exception — in open court before the jury retired from the bar of the court.

The defendant, by its attorneys, prayed the court to charge the jury as follows, to wit: If there is no evidence before you as to the probable duration of the plaintiff's life, then you cannot find damages for future loss that plaintiff may sustain in consequence of his injuries. You are not left to mere conjecture as to the probable duration of plaintiff's life; there must be evidence on this point in order to justify you in giving compensation for future loss.

The court refused to give this charge as prayed for by the defendant, by its attorneys, and the defendant, by its attorneys, excepted to the refusal of the court to so charge the jury, and this exception was taken in open court before the jury retired from the bar of the court.

92 The court also gave the following written charges, and the defendant, by its attorneys, excepted, in open court and before the jury retired from the bar of the court, to each of these charges separately as they were severally given by the court:

1st. If the jury believe from the evidence that plaintiff was a passenger on the train of the defendant running in the State of Georgia, and that the accident occurred in the State of Georgia which resulted in the injury to the plaintiff, and for which this suit is brought, then the defendant cannot be held liable to the plaintiff for such injury if *he* exercised extraordinary diligence on behalf of *himself* and *his* agents to protect the lives and persons of *his* passengers; *he* is not liable for injuries to the person of the plaintiff if *he* used such diligence, and the term "extraordinary diligence" means that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property used under like circumstances and when their own safety is involved.

2nd. If the evidence satisfies the jury that the defendant has exercised the utmost care and diligence of very cautious per-
93 sons in providing cars for the conveyance of its passengers and a roadway for the transit of such cars, this is sufficient to authorize the jury to find their verdict for the defendant. The defendant is not compelled to show to the satisfaction of the jury the exact manner and cause of the accident in order to exempt it from liability to the plaintiff.

3rd. The jury, in determining the question of the care and diligence required to be exercised by the defendant company in providing and keeping up a safe roadway for the passage of *their* coaches over it, are not to consider the facts and circumstances as developed by the accident, unless such facts and circumstances could have been discovered by the exercise of reasonable care and caution of very prudent persons before the accident.

4th. Passenger carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go—that is, to the utmost care and diligence of very cautious persons; and if the evidence satisfies the jury that there has been no negligence and that the damage or injury has been occasioned by
unavoidable causality or by some cause which human care
94 and foresight could not prevent, then the verdict of the jury
should be for the defendant.

5th. A common carrier is not liable for the safety of passengers to the same extent that a common carrier is for the safety of property. He does not insure the safety of passengers nor is he responsible for injuries suffered by them from any cause other than his own or agent's negligence or wilful wrong; but extraordinary diligence, care, and prudence is required, aided by the highest skill.

6th. If the jury should find from the evidence that there was no want of proper skill or care and caution on the part of the defendant in the construction and maint*ai*nance of its road-bed at the place where the accident complained of in this case occurred, and in running its trains at the time of the occurrence of the accident, then they must find for the defendant.

7th. If the defendant had agents running *their* locomotives and
cars of competent skill, and said agents used all the care and
95 diligence that would be used by a very prudent, careful man
under similar circumstances, when his own safety was concerned, and without negligence, and if the defendant had agents in charge of *their* road-bed of competent skill, and said agents used all of the care and diligence that would be used by a very prudent, careful man under similar circumstances, when his own safety was concerned, and without negligence, in keeping up the road-bed, then the defendant would not not be liable to the plaintiff.

8th. Even if the jury should believe from the evidence that the road-bed was out of repair at other places than that at which the accident occurred they cannot make the defendant liable to the plaintiff in this action because of such want of repair at such other places.

9th. Unless the jury believe from the evidence that the defendant's road was, at the time of the grievance complained of, at the place of the accident, out of repair by the fault or negligence of the defendant or its agents, or that the train of cars in which plaintiff was being transported was thrown off the track by the negligence
or mismanagement of the defendant, or its agents conduct-
96 ing or running the same, they will find for the defendant.

10th. Carriers of passengers are not insurers of the safety of their passengers. Their duty is measured by the danger which attends railroad carriage, and the utmost foresight as to possible dangers and the utmost care and prudence in guarding against them are sufficient, when exercised, to exempt carriers from liability in case of an injury to a passenger.

11th. When a passenger travels on a railroad train or any other public conveyance he expects to take and does take the hazard of such accidents as may occur to him without the want of care and diligence required on the part of the carrier, and the carrier is not liable for injury to a passenger which resulted from an accident which proper care and foresight, skill, or science could not have guarded against.

12th. The care, skill, and diligence required of carriers of passengers must be proportionate to the danger of their particular mode of conveyance, but they are not insurers against all accidents, and the passengers take all the risks incident to the mode
97 of travel. This doctrine is not to be construed as meaning
that the carrier must adopt all the precautions that an ingenuous mind suggests, which have not been brought into approved use, nor that he must use all the precautions which, after the accident has happened, it can be seen would have sufficed to avoid it, nor even must he use such precautions as one would use who knew beforehand that the accident would otherwise certainly occur. Omniscience is not required of railroad officers or employes.

13th. The expressions "as far as human care and foresight will go" and "the utmost care and diligence of very cautious persons" are not intended to extend the rule of duty of carriers to the point of requiring them to become practically insurers of the safety of passengers; nor are they intended to extend the rule so as to practically require them to know in every case before an accident as well how to provide against its happening as they might learn by seeing the results of the accident.

14th. It is sufficient for the defendant to show that its road
98 at the place of the accident was in a sound and safe condi-
tion, and if the jury are satisfied from the evidence that it was in such condition at such place, and that the accident occurred from some unknown and unavoidable cause, which could not have been provided against by the exercise of very great skill, prudence, and care, and if they believe further from the evidence that such skill, prudence, and care were exercised by the defendant in keeping up the road at this place and in providing safe and suitable cars for the transportation of their passengers, then their verdict must be for the defendant.

All of the foregoing exceptions were taken in open court in the presence of the jury and before the jury retired from the bar of the court.

Thereupon the defendant, by its attorneys, tenders this its bill of exceptions, and prays that the same may be signed and sealed in term time and made part of the record in this case, which is accordingly done in open court this the 13th day of the month of February, in the year of our Lord eighteen hundred and eighty-four.

JOHN BRUCE, *Judge.*

99 Filed February 13, 1884.

J. W. DIMMICK, *Clerk.*

Appeal Bond.

Know all men by these presents that we, The Central Railroad and Banking Company of Georgia, Wm. Hunter, R. B. Reppard, and Josiah Morris, are held and firmly bound unto James C. McKenzie in the full and just sum of thirty-three thousand six hundred dollars, to be paid to the said James C. McKenzie, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eleventh day of February, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at a circuit court of the United States for the middle district of Alabama, in a suit depending in said court between the said James C. McKenzie as plaintiff and The Central Railroad and Banking Company of Georgia as defendant, a judgment was rendered against the said The Central Railroad and
100 Banking Company of Georgia, and the said The Central Railroad and Banking Company of Georgia having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James C. McKenzie, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next: Now, the condition of the above obligation is such that if the said The Central Railroad and Banking Company of Georgia shall prosecute its writ of error to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

W. G. RAOUL, [SEAL.]
Pres'd't C. R. R. & B'k'g Co. of Ga.

Attest: T. A. CUNNINGHAM, *Cashier.*

WM. HUNTER. [SEAL.]
R. B. REPPARD. [SEAL.]
JOSIAH MORRIS. [SEAL.]

Sealed and delivered in presence of—
[SEAL.] WM. W. ROGERS,
Not. Pub., Chat. Co., Ga.

Approved by me this 13th day of Feb'y, 1884.

JOHN BRUCE, *Judge.*

Filed this 13th day of February, A. D. 1884.

J. W. DIMMICK, *Clerk.*

101 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the middle district of Alabama, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you between James C. McKenzie and The Central Railroad and Banking Company of Georgia, a manifest error hath happened, to the great damage of the said The Central Railroad and Banking Company of Georgia, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record 102 and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 13th day of February, in the year of our Lord one thousand eight hundred and eighty-four.

J. W. DIMMICK,
Clerk of the Circuit Court of the United States,
Mid. Dist. of Alabama.

Allowed by—
JOHN BRUCE, *Judge.*

Filed Feb. 13, 1884.

J. W. DIMMICK, *Clerk.*

Citation.

The United States of America to James C. McKenzie, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error 103 filed in the clerk's office of the circuit court of the United States for the middle district of Alabama, wherein the Central Railroad and Banking Company of Georgia is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this thirteenth day of February, in the year of our Lord one thousand eight hundred and eighty-four.

W. B. WOODS,
Associate Justice U. S. Supreme Court.

On this thirtieth day of May, in the year of our Lord one thousand eight hundred and eighty-four, personally appeared before me the subscriber, W. G. M. Golson, United States marshal, and makes oath that he delivered a true copy of the within citation to James C. McKenzie, at Eufaula, Ala., on the 29th day of May, A. D. 1884.

W. G. M. GOLSON,
U. S. Marshal.

Sworn to and subscribed the 30th day of May, A. D., 1884.

BENJ. P. SEALS,
Dep. Clerk U. S. Cir. Court, Mid. Dist of Alabama.

104 UNITED STATES OF AMERICA, *Middle District of Alabama,* } *ss:*

I, J. W. Dimmick, clerk of the circuit court of the United States for the middle district of Alabama, hereby certify that the foregoing pages, numbered from one to one hundred and three, inclusive, contain a full, true, and complete transcript of the record and proceedings in a cause lately pending in said court, wherein James C. McKenzie was plaintiff and The Central Railroad and Banking Company of Georgia, defendant, as the same appear of record and on file in my office as such clerk.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Montgomery, in said district, this twelfth day of June, A. D. 1884.

[Seal of the United States Circuit Court, Middle District of Alabama.]

J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. of Alabama.

105 *Assignments of Error.*

In the Supreme Court of the United States. October Term, 1884.

THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA,
Plaintiff in Error,
versus
JAMES C. MCKENZIE, Defendant in Error.

And now the said The Central Railroad and Banking Company of Georgia, by A. R. Lawton, its attorney, comes and says that in the foregoing record and proceedings there is manifest error is this, to wit:

1. First. Because said circuit court decided that it had jurisdiction of this case.

2. Second. Because said circuit court erred in overruling

106 the motion to set aside the service of the summons.

3. Third. Because said court erred in sustaining the demurrer to the motion to set aside the service of the summons.

4. Fourth. Because said court erred in sustaining the demurrer to the plea in abatement.

5. Fifth. Because said court erred in overruling the demurrer to the complaint.

6. Sixth. Because said court erred in permitting the witness Lancaster to testify that there was some rotten timber along the road in the same section and in the vicinity where the accident occurred, and as to the condition of the railroad track at other points than that of the accident.

7. Seventh. Because said court erred in refusing to rule out and exclude from the jury the testimony of the witness, John

107 Moore, as to the condition of the railroad track at places other than where the accident occurred.

8. Eighth. Because said court erred in refusing to rule out and exclude from the jury the testimony of the witness Hatcher as to the condition of the railroad track at places other than where the accident occurred.

9. Ninth. Because said court erred in refusing to rule out and exclude from the jury the testimony of the witness, Taylor Moore, as to the condition of the railroad track at places other than where the accident occurred.

10. Tenth. Because said court erred in refusing to rule out and exclude from the jury the testimony of the witness, J. E. Smith, as to the condition of the railroad track at places other than where the accident occurred.

11. Eleventh. Because said court erred in charging the jury

108 that when treating and discussing the subject of transportation of passengers by steam there is, perhaps, scarcely such a thing as slight negligence.

12. Twelfth. Because said court erred in charging the jury that when the interests are so great and life is involved slight negligence under such circumstanes, when there is such responsibilty resting upon the carrier, becomes, indeed, gross negligence in the eye of the law.

13. Thirteenth. Because said court erred in charging the jury that in estimating the plaintiff's damages they should look to the future as well as to the past if the evidence shows that his condition of health, and his business capacity, and his pain and suffering will probably extend into the future as well as his injury from the time of the accident until now.

14. Fourteenth. Because said court erred in refusing to

109 charge the jury, as requested by the appellant, to wit, a common carrier of passengers is not liable to the same extent that a common carrier is liable for the safety of property; he does not insure the safety of passengers, nor is he responsible for injuries suffered by them from any cause other than his own or his agents' negligence or willful wrong.

15. Fifteenth. Because said court erred in charging the jury that extraordinary diligence, care, and prudence, aided by the highest skill, are required of common carriers of passengers.

16. Sixteenth. Because said court erred in refusing to charge the jury, at the request of the appellant, that the presumption of negligence is slight.

17. Seventeenth. Because said court erred in refusing to
110 charge the jury, at the request of the appellant, that to justify
them in taking into consideration the future physical pain
and suffering of the plaintiff (in the court below) it must be made reasonably certain that such future pain and suffering are inevitable, and if they be only probable or uncertain they cannot be taken into the estimate.

18. Eighteenth. Because said court erred in refusing to charge the jury, as requested by the appellant, that, if there was no evidence before them as to the probable duration of the appellee's life, they could not find damages for future loss appellee may sustain in consequence of his injuries.

19. Nineteenth. Because said court erred in refusing to give the charges asked, in writing, by the appellant as shown by the transcript and numbered one, two, three, four, five, six, seven,
111 eight, nine, ten, eleven, twelve, thirteen, and fourteen.

Wherefore, and for divers other errors apparent on the face of said record, said plaintiff in error, The Central Railroad and Banking Company of Georgia, prays the aforesaid proceedings be reversed and said cause remanded to said circuit court.

A. R. LAWTON,
Attorney for Plaintiff in Error.

112 [Endorsed:] Supreme Court U. S. 1884. October term.
No. 933. The Central Railroad and Banking Co. of Georgia,
pl'ff in error, *vs.* James C. McKenzie. Assignment of errors.

[Stamped:] Office Supreme Court U. S. Filed Oct. 2, 1884. James H. McKenney, clerk.

Endorsed on cover: M. Alabama C. C. U. S. No. 300. The Central Railroad and Banking Company of Georgia, plaintiff in error, *vs.* James C. McKenzie. Filed 15th September, 1884.